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OPINION

OF THE

SUPREME JUDICIAL COURT

OF MASSACHUSETTS,

IN THE CASE OF

WILLIAM EAGER vs. THE ATLAS INS. CO.

WITH

REMARKS THEREON,

BY AN UNDERWRITER.

BOSTON:

JOHN. H. EASTBURN, PRINTER.

1833.

ERRATA.

- 5th page, 7th line from top, for "effect," read affect.
 22d " 6th line from bottom, for "insured," read insurer.
 31st " 6th " " top, for "defendant's" read defendants,
 " " 14th " " " dele "as".
 32d " 14th " " " for "insured," read insurer.
 35th " 4th " " " for "costs," read cost.
 " " 9th " " " for "insurer," read insured.
 " " 3th " " bottom, for "466,67," read 600
 45th " 6th " " " for "loss," read lost.

Rec. June 20, 1904

S U F F O L K , S S .

SUPREME JUDICIAL COURT, MARCH TERM, 1833.

WILLIAM EAGER v. THE ATLAS INS. CO.

WILDE J. DELIVERED THE OPINION OF THE COURT.

This case is submitted to our consideration, upon an agreed statement of facts, for the purpose of obtaining a revision of one of the points decided in the case of Brooks vs. The Oriental Insurance Company ; and as that decision was made without a very full discussion, though certainly not without consideration, we have very willingly re-examined the subject. But after fully considering the arguments and opinions to which we have been referred, in which the question is discussed with great ability, and after due deliberation, we have been unable to perceive any sufficient reason for overruling our former decision.— On the contrary, a more close and thorough examination of the principles and the reasons of that decision has rather tended to strengthen and confirm our confidence in its correctness.

The question to be re-considered is, whether in adjusting a partial loss on a vessel after repairs made, the deduction of one third from the whole expenses

of the repairs is to be made, for the substitution of new materials and work for old ; or whether the proceeds of the old materials not used in the repairs should be first deducted, and the one third be taken from the residue.

Another question arises from the facts agreed, which was not considered in the case of *Brooks v. The Oriental Ins. Co.* and which depends on the usage of the insurance offices of Boston, and "the rules and customs of assurance" referred to in the policy. This question, if determined in favor of the defendants will be decisive, and we have therefore attentively examined the grounds upon which it appears to us to depend. The result of the examination I will now briefly state.

It is agreed by the parties, that at the time of the underwriting the policy, and at the time of the loss, it was the usage of the insurance offices then existing in Boston, in adjusting a partial loss, to deduct one third new for old from the gross amount of the expenses of repair. And it appears by the policy, that in the clause enumerating the perils insured against, after specifying the seas, fire, enemies, &c. there is added, "and all other losses and misfortunes, which have or shall come to the damage of the said ship, to which insurers are liable by the rules and customs of insurance in Boston." The defendant's counsel contend that this clause in the policy, coupled with the usage before stated, must so control the construction of the contract, as to settle the present question in their favor, whatever may be the general rule of law as to the adjustment of similar losses in other cases.

That a local usage, as well as general usages of trade, may materially affect the construction of :

contract, cannot be denied ; but to have this effect such usage must appear to be so well settled, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that the contract was made in reference to it. Such a presumption is the only basis, on which any local or particular usage can be sustained so as to effect the construction of a contract. The usages or customs of particular places are not binding unless the parties contract in reference to them, and if their agreement be reduced to writing, the reference ought to appear by the terms of the contract. To allow particular usages to control or vary the construction and legal effect of a written contract would be repugnant to the rules of evidence and might be followed by perilous and mischievous consequences. Courts take no notice of these local and particular usages ; they are to be proved like other facts and necessarily by parol evidence. *Gordon v. Little*, 8 Serg. and R. 557 : 3 Rawle, 103 ; 1 Caines, 44.

But if parol evidence were admissible and particular usages might control or vary the construction of a written contract, an insuperable objection to the defence, so far as it depends on the question of usage, would remain. For whatever may have been the usage and however well known, it can have no effect on the contract, unless it was adopted by the parties, and the contract was made in reference to it ; of this there is no proof, nor ground of presumption ; on the contrary the terms of the contract strongly rebut any such presumption. It has been already remarked, that the rules and customs of insurance in Boston are expressly referred to in the policy, but for a purpose foreign to the present question. That reference was introduced for the purpose of designating the

perils insured against, and of supplying any omission in the list of those which are enumerated ; but it has no relation to the mode of adjusting a partial loss. There are stipulations in the policy touching partial losses, but none in respect to the question now to be considered. This question had been settled in New York years before this policy was underwritten, and for some time before had been pending in this Court for decision. From these and other circumstances, the presumption is strong, that the parties did not treat as to the mode of adjustment, on the basis of usage, but on that of existing law, however it might be decided. When the contract refers to "the customs and rules of insurance in Boston" and specifies how far they shall constitute a part of the contract, it must be inferred that the parties did not intend that it should be affected thereby beyond the extent specified ; especially as the form of the policy was no doubt settled and adopted with great care and deliberation.

These considerations appear to us quite sufficient to settle the question of usage, but other considerations might be added if necessary. The usage relied upon by the defendants is opposed to the essence of the contract of insurance which is a contract of indemnity. That the usage, if applied to the contract, would deprive the assured of a full indemnity and give to the underwriters an unreasonable advantage, I shall endeavour to show in discussing the principal question. The usage is also opposed to the rule of law, as we understand it, by which partial losses when vessels have been repaired, are to be adjusted. The rule of deducting one third new for old probably originated in usage, but it has been long known and settled in the commercial world and has been

adopted by courts, so that it is now a well settled principle of law. Now it seems to me very clear, that no particular usage opposed to the established principles of law can be sustained. And so it was decided in the case of *Homer v. Dorr*, 10 Mass. R. 26. The insurance was on property laden on freight from Boston to Archangel and back to Boston taking the risk on shore as well as on board. In an action on the premium note, it was held that the whole note was recoverable, although no property was returned in the ship; and it was proved to be the universal usage in Boston, where the insurance was effected, to return a portion of the premium in such cases. Again if local usages are to be admitted to control the rule in question, the object and intention of the rule will be defeated. It was adopted for the sake of convenience, and to avoid the difficulty of ascertaining the relative value of the new and old materials; but there would be less difficulty in ascertaining this, than there would be to settle the various usages, that might spring up in different ports, if every local usage were allowed to control the principles of law. In Boston the one third new for old might be deducted from the gross expenses of repair; in Salem the proceeds of the old materials might be first deducted; and in some other port some other modification might be introduced, either by increasing or diminishing the rate of deduction, so that we might have as many different usages and laws as there are ports in the Commonwealth. Instead, therefore of having a simple certain and convenient rule for our guide, we should have to consult and ascertain these local usages; and to conform to the various changes and fluctuations in them which circumstances might from time to time introduce.— These local usages may be useful, and are admitted,

to explain the intention of parties, where there is reason to presume that the contract was made in reference to them, but to suffer them to prevail so as to sap the foundation of a well established rule of law would be going too far. In the present case however, it is not necessary to determine how far particular usages may be binding, or explanatory of contracts, or of the rules of damages; it is sufficient to decide, that they can have no effect upon any contract, unless by the consent of the contracting parties, either express or implied. No such contract appears in this case, and it cannot be presumed, for the reasons already stated; and this seems to be decisive as to the question of usage.

The remaining question is more important and more involved in doubt and difficulty. The arguments and opinions opposed to the decisions in *Byrnes v. National Ins. Co.* 1. Cowen, 265 and *Brooks v. Oriental Ins. Co.* 7 Pick. 259, which have been recently published, are undoubtedly entitled to great consideration; still however we continue to think that those decisions are sustained by the most weighty and convincing reasons.

All agree that the contract of insurance is one of indemnity, and that this is in truth the essence of the contract. The assured are entitled to a full indemnity from the underwriters and nothing more. That rule therefore is the best, which will in the settlement of a loss most fully and exactly fulfil this principal intention of the contract. It is also admitted, that the rule of deducting one third new for old, however construed, will not always secure an exact indemnity. The assured will recover more or less than an indemnity according to the age and state of the vessel before the loss, but this imperfection of

the rule is supposed to be more than compensated by its certainty, simplicity and practical convenience. Before the introduction of the rule, the relative value of the new and old materials was ascertained by appraisement in each case ; and the difference between the cost of the new materials and work, and the value of the old materials at the time of the loss, was deducted, leaving the balance for which the insurer was liable. This being found inconvenient, and it being difficult to ascertain the value of the old materials with accuracy, the rule of deducting one third new for old was long since substituted for the ancient mode of adjustment, and its continuance for such a length of time proves its practical utility.— Since the introduction of the rule, neither party can question the relative value of the new and old materials, whether the rule in a particular case should afford an exact indemnity or not. Thus far the parties are bound by the rule, but no further. This, like all other general rules, when applied to a multiplicity of cases, will not always do exact justice, but it should be so applied as to do as little injustice as possible. It will not do to say, that because a rule of necessity produces some unjust results in particular cases, it should be so applied as to produce other similar results without necessity ; and that such must be the effect of the rule contended for by the defendant's counsel, cannot, we think, well be doubted.

Let us suppose, for example, that the vessel parts her cable in a storm, but that a part is saved which is sold for \$200, and that a new cable is purchased which costs \$300. If one third is deducted from the full price of the new cable, this balances the account, and the assured is entitled to no indemnity. If the part of the old cable saved should sell for \$250

the assured in stating an account would become indebted to the underwriter \$50. And so whenever the old materials sell for more than two-thirds of the amount of the expenses of repairs, a balance will be found in favor of the underwriter. Whether he can claim it or not, is not the question ; nor is it any good answer to the objection resulting from the unjust operation of the rule, to say that such cases will but rarely occur ; for a result so unjust, and so manifestly opposed to the spirit of the contract of insurance, ought never to occur. But without supposing extreme cases, it seems to me that generally the assured will not receive full indemnity, if a third new for old is to be deducted from the whole expenses of repairs, without first deducting the salvage. The salvage is no part of the loss, and belongs to the assured ; the amount of that, therefore, ought to be withdrawn from the operation of the rule, or the assured will fail to recover a full indemnity. It is said that the assured, by such a rule, would recover more than an indemnity, and that injustice would be done to the underwriter. For instance if the expenses of repairs amount to \$600, and the old materials sell for \$200, then it is said, the assured would be fully indemnified by the recovery of \$200, the increased value by the new materials being \$200, as assumed by the rule ; whereas by first deducting the proceeds of the old materials, and then deducting one-third from the residue, the assured would recover \$266 67, being \$66 67 more than a full indemnity. But there is a fallacy, we think in this objection and statement.

It is true that the vessel is made better by the repairs ; but it by no means follows, that the whole amount of the increased value is to be credited to

the underwriter. So far as he contributes to the expenses of repairs he should be credited for the increased value, but no further. Now the underwriter has no concern with the expenses of repairs which are defrayed by the old materials. So far as these go, the subject repairs itself, and thus far there is no claim for indemnity. The further disbursements required to repair the loss, are to be made at the expense of the underwriter, and on these expenses he is entitled to a deduction of one-third ; but there seems to be no good reason for extending the rule beyond these limits.

In the case last supposed the adjustment would be thus stated.

Whole expenses of repairs	-	\$600 00
Deduct expenses paid by the proceeds of the old materials those being the property of the assured	-	200 00
		400 00

The remaining disbursements being made at the expense of the under- writer, he is entitled to a deduction of one-third new for old,	-	133 33
		266 67

And he is chargeable with the sum of \$266 67 ; which gives generally to the assured a full indemnity and no more. There may be some exceptions ; but in adopting a general rule of decision we are to look at general results.

But it is denied that the old materials are the property of the assured ; it is however difficult to conceive how and when, before the adjustment of the loss, the property in the assured becomes divested

and vested in the underwriter. It is said that if the underwriter pays the full amount of the loss, the old materials become his property ; that if a cable is lost, and afterwards the loss is adjusted and the underwriter pays, the old cable if recovered would become the property of the underwriter. And so if part of the cargo is lost, and the loss is paid by the assurer, the lost articles if recovered would belong to him.— This may well be admitted, without affecting the question under consideration, for until an adjustment is made, the old materials continue to belong to the assured, and if they are disposed of, and the proceeds are applied to the purchase of new materials, the underwriter, as to that part of the expenses of the repairs, can have no claim to an allowance for the increased value. The repairs made by means of the salvage constitute no part of the loss, and cannot be charged against the insurer ; the old materials therefore clearly belong to the assured.

But a weightier objection to our former decision remains to be considered. It is said to be immaterial, to whom the old materials belong, or who pays the disbursements for repairs, because at all events the ship is made one-third better by the repairs, and therefore that one-third of the gross expenses should be deducted or the assured will receive more than an indemnity. And this would be true, if the fact were that such would be in all cases the increased value, or if the presumption is to be carried to the extent the objection supposes. But presumptions against facts, established for convenience, are to be strictly guarded, and a rule founded upon such presumptions is to be confined to the purposes for which it is adopted. Now it has been already remarked that the rule in question was adopted to avoid the difficulty

and uncertainty of ascertaining the loss, and the amount of indemnity therefor, by appraisement in each particular case. This rule was founded on the supposition or presumption, that generally the new materials are one-third better than the old.—The question then is how far this presumption is to be carried out, and to what portion of the repairs the rule is to be applied. We understand the rule to be, that one-third is to be deducted from the expenses of repairing the loss, and that the loss is the injury done to the vessel which remains after the proceeds of the old materials have been applied.—This is the loss against which the underwriter stipulates to indemnify the assured, and so it was considered before the introduction of the existing rule. 1 Magens, 193. The rule, therefore, and the presumption as to the relative value of the materials, are to be confined to the portion of the repairs remaining after crediting the old materials. These go to reduce the cost of repairs, the underwriter being only chargeable with the difference between the proceeds of the old materials and the cost of the new, and the amount of the difference is the amount paid to repair the loss, on which the deduction of one-third new for old is to be made.

This on the whole as we think, is much the most equitable rule of adjustment, and best adapted to secure, as nearly as any general rule can, exact indemnity ; and that commonly it will not be found too favorable to the assured. Whereas the rule contended for by the defendants might lead to injustice and even absurdity ; or to a train of exceptions which might be very embarrassing.

Judgment for the plaintiff.

BOSTON, July 20th 1833.



R E M A R K S .

As the decision of the case of Brooks vs. the Oriental Insurance Company, prescribed a new rule for the adjustment of partial losses on ships with salvage ; as existing—executory contracts to a vast amount, would be materially affected by this rule ; as the former rule had long been established, and was, till recently, in New York, in universal practice,—and known and acknowledged by the parties to those contracts at the time they were made ; as the old rule was believed to be right, and the new rule to be wrong,—these several considerations produced an impression, that the decision was not the result of full discussion, and mature deliberation. The importance of the question rendered a re-consideration of that decision a very desirable object to the several insurance companies in Boston, as it was generally maintained by them, that the decision was not only wrong in itself ; but, if otherwise, it did not affect the contracts, made under their form of policies, because *these* contained a provision, which *that*, on which the decision was made, did not ; and which, they conceived, exempted them from the operation of the rule. That provision follows an enumeration of the several perils assumed by the insurer, and is in these words, “ and all other losses and misfortunes which have, or shall come to the damage of the said ship, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston.”

Under this form of policy, the Atlas Insurance Company insured one half of the ship Grecian, owned by William Eager. The policy was made prior to the decision of the Court in the case before mentioned. The ship, while thus insured, sustained damage in her bottom, by which it became necessary to strip off the old copper and to substitute new. The loss having occurred subsequently to that decision, a claim was made on the principle of the rule therein prescribed.

The insurers of the ship refused to settle upon that principle; but proposed to adjust the loss in the customary mode, and to give an obligation to pay the owner of her, the difference between the two modes of adjustment, if the Court, on a re-consideration of the question, should confirm their former opinion, and decide, that the insurers, under their form of policy, were not exempted from the operation of the rule.

An adjustment was accordingly made agreeably to the general usage. One-third was deducted from the value of the new materials and labor, and the proceeds of the old materials were credited to the insurers. Under this form of adjustment the net amount of

loss was	-	-	-	-	\$1418 00
Under the new form it amounted to	-				1871 74

Making under the two forms, a difference of \$453 74

For this difference, obligations as before stated, were given by the Columbian Insurance Company for one half, and by the Atlas Insurance Company for the other—one half of the ship being insured by each company. For this proportion an action was commenced against the last named company in the Supreme Judicial Court of Massachusetts. It was

agreed by the parties, that, at the time of underwriting the policy, and at the time of the loss, it was the usage of the insurance companies then existing in Boston to adjust losses of this nature by the mode contended for by the defendants.

The defendants contended, that the rule of adjustment established in Boston, was the rule used and established in all other places in the commercial world, except New York ; that the contract of insurance being one of indemnity, the rule established in the case of Brooks vs. the Oriental Insurance Company, was contrary to the law of insurance, because the insured would obtain by it, more than an indemnity ; that the rule being repugnant to the rules and customs of insurance in Boston, they were not liable to its operation under their form of policy.

The facts in the case being admitted, it was submitted to the Court for judgment on the law. The Court in giving their opinion also admitted :

1st. That a *local usage*, as well as *general usages* of trade may materially affect the construction of a contract ; but, to have this effect, such usage must appear to be so well settled, and of so long a continuance, as to raise a fair presumption, that it was known to both contracting parties, and that the contract was made in reference to it :

2dly. That, the contract of insurance is one of indemnity, which is its essence ; and, that the insured are entitled to a full indemnity from the underwriters, and nothing more :

3dly. That deducting one-third new for old is a rule of law, long since introduced, and of practical utility : And the court maintained :

That, in case of repairs to a ship the old materials, for which new have been substituted, belong to the in-

sured until the loss is adjusted ; that the value or proceeds of those materials, must be deducted from the gross amount of the repairs, and the difference is the loss, to which the rule of deducting one-third new for old is to be applied.

The decision of the Court was for the plaintiffs ; and the principles and opinions on which that decision rests, and the reasonings which led to it, we propose to examine.

In executing this intention, we shall speak of the opinions of the Court with respect, but with freedom. Their opinions will be treated according to their intrinsic worth ; not according to a value derived only from official authority. We know not why Judicial opinions should not be subject to examination, as well as others of public interest. The Supreme Judicial Court is not an infallible tribunal. Their decisions are received as law, and, when proclaimed, are rules of action for the community. From those decisions there is no appeal. If they are wrong, the effects upon the people will be mischievous. The Judges are, and ought to be, independent in their salaries, and their stations. Thus situated, we have a right to expect, that their opinions will be the result of the most patient investigation of facts and a sincere desire to ascertain the truth and to establish sound rules of law for the administration of justice—that prejudice, passion and an adherence to former opinions, merely because they have once been proclaimed, will have no influence in their determinations. The decisions of our Courts of Law deeply concern the public. They operate on life, liberty and property. They are acts of public agents, and, as such, are subjects on which the public have a right, whenever they please, to express and publish

their sentiments. A judicious, impartial and learned tribunal has nothing to apprehend from a public examination of its acts. Sound opinions will bear handling: and the discussion of those of the judiciary, so long as it is conducted with temperance and propriety, will be productive of good, not of evil.

The first point considered by the Court was that of usage. The usage contended for by the defendants, was not whether a third new for old should be deducted; but whether it was the usage to make the deduction for wear and tear from the gross amount of repairs. This the Court considered and treated as a *local* usage. Although *the rules and customs* of insurance in Boston, are expressly referred to in the policy; yet, so far as those rules and customs agree with the rules and customs of other commercial states and nations, they are not *local*. Whether the usage contended for by the Defendants was or was not a *local usage*, should, if the fact were essential in the case, have been *ascertained*, not *assumed*. If the Court had investigated the subject, they would have discovered, that it was not a *local*, but a *general* usage—an usage not peculiar to Boston, but common to the whole commercial world, except New York; whose example, in this case, appears to have been followed, without duly considering the results to which it leads. If proofs of the fact had been required, proofs could have been adduced. If authorities were wanted, the books furnish them. But that the Court labored under some misapprehension as to the matter in question, is apparent from the fact, that the citation made by them from Magens l. p. 193. is directly opposed to the doctrine they have here advanced, as well as to that, for the support of which it was adduced. The question, or the quotation

The usage
contended for
not *local* but
general,

and long es-
tablished.

must have been misunderstood ! For, by this very authority, quoted by the Court themselves, it appears, that the usage contended for by the defendants, was the usage nearly a century ago—that the only difference in the mode of adjustment *then*, and that *now* practiced here, is, that the value of the old materials lost was *then* ascertained by appraisement, but is *now* established and admitted in all cases, to be two thirds of the original cost : But, from the value thus deduced, it was the usage *then* as *now* to deduct the value, or proceeds of the old materials. Thus the authority quoted establishes two points at once : 1st. that the usage contended for by the Defendants is not a mere *local usage* ; and 2dly. that it is a *usage of long continuance*. The Court, therefore, in considering and treating it as a *local usage*, have mistaken the fact.

The usage was known to the parties to the contract & the contract was made in reference to it.

Local usages have the force of law where they prevail, &c.

We have shown, that the usage in question is not local ; and we will next show, that it was *known to the parties* ; and that the contract was made in reference to it. “ Besides the general law of merchants, there are certain usages which prevail in particular countries, and sometimes in particular branches of commerce. These, like local customs in *England*, have the force of law where they prevail ; and where they are in force, are always supposed to be in the contemplation of the parties ; and the contract of insurance is construed as having been made with reference to them. But then they must appear to have been long established ; that is, as I humbly apprehend, they must be immemorial, or at least coeval with the branch of commerce to which they belong.”*

*Marshall on Ins. Intro. p. 19.

Here we have authority to show, that a *local custom long established has the force of law where it prevails*; and, where it is in force, is always supposed to be in the *contemplation of the parties, and the contract of insurance is construed as having been made in reference to it*. What ground, then, had the Court for asserting, that there was no proof, nor ground of presumption, that the usage contended for, *was adopted by the parties*; nor that the *contract was made in reference to it*? Is it no proof, that such a rule of settlement had existed for nearly a century? Is it no proof, when the usage is *general and long established*? Is it no proof, when the *books lay it down as the rule of adjustment*? Is it no proof, when such a mode of adjustment as that for which the Plaintiffs contend, could not, at the time of making the contract, be found on the records of any insurance company in the Commonwealth? If this be no *proof* that the *Plaintiffs knew* of such an usage, and that the contract was made in reference to it, is it no *ground of presumption* that they *knew* it?

How strange too does it appear, that in the page next but one preceding, the Court say: "*It is agreed by the parties, that at the time of underwriting the policy, and at the time of the loss, it was the usage of the insurance offices, then existing in Boston in adjusting a partial loss, to deduct one third for new from the gross amount of the expenses of repairs.*" Here is an admission, that the *usage was adopted by the parties, and that the contract was made in reference to it*, of which the Court say, "*there is no proof, nor ground of presumption.*"—How the decision of the Court can be reconciled with the facts and the doctrine, is a question, we imagine, of difficult solution.

The policy
has reference
to such usage.

The Court then proceed, and decide, that the clause in question was introduced, “for the purpose of designating the perils insured against, and of supplying any omission in the list of those, which are enumerated; but it has no relation to the mode of adjusting a partial loss.”

What is the language of the policy? It is this. “And all other *losses* and *misfortunes*, which have, or shall come to the damage of the said ship to which insurers are liable by the rules and customs of insurance in Boston.” The phraseology we will not defend. The Court have considered *perils* and *losses* as synonymous terms; and so too, we presume, the word *misfortune* must, in this connexion, be considered. The policy, therefore, enumerates certain losses which the insurers are to bear; and then adds, certain other losses not enumerated, but which are restricted to those, to which “*insurers are liable by the rules and customs of insurance in Boston.*”

The insurers
not liable for a
loss created
only by a
mode of ad-
justment re-
pugnant to
usage.

The policy proceeds farther—It contains a proviso, that the insurers “shall not be liable for any partial loss on the ship,” “unless it amount to five per cent.” The loss, in this case, the Court considered as a partial loss. Now, in many cases, a loss or damage to the ship would not amount to five per cent. if adjusted according to the *rules and customs of insurance in Boston*; but would amount to five per cent. if adjusted according to the *rules and customs of insurance in New York*. Can, then, the *losses* that are made so for the insured by an adjustment by the *rules and customs of New York*, be the *losses* which are meant in the policy, as those to which insurers are liable by the *rules and customs of Boston*? When the mode of adjustment determines, whether a claim for damage be a loss or not a loss, within

the meaning of the policy, the words must have been evidently introduced, not “for the purpose of designating the perils insured against,” but for the purpose of proclaiming, that they assumed no *other losses*, than those to which insurers were liable by the *rules and customs of Boston*. The words, therefore, instead of having “no relation,” have a very near relation “to the mode of adjusting a partial loss,”—the relation of cause and effect: for, if the rules and customs of Boston have no relation to the mode of adjusting a loss, it has been shown, that the insurers would be subjected to losses, which they never *assumed*, nor were *contemplated* by the parties to the contract, at the time it was made. We have thus shown,

1st. That the *usage* contended for by the Defendants is not a *local*, but a *general* usage :

2dly. That the *usage* has been *long established*, and was *known* and *adopted* by the parties to the contract, which was made in reference to it :

3dly. That *local usages*, in such circumstances, have the force of law, and bind the parties :

4thly. That the policy has reference to *those usages*, as they relate to the mode of adjusting losses :

Therefore, from the principles and doctrines laid down by the Court themselves, the defendants were *not liable* under their form of policy for the claim made upon them.

The Court, having decided the question of *usage*, proceed to consider the question of *indemnity* under the rule established in the case of *Brooks vs. the Oriental Insurance Company*. The Court maintained, that, by this rule, the insured would, in all cases, of partial loss on the ship, receive an indemnity ; but

by that contended for by the defendants, and which had been nearly a century in operation, the insured *never would receive an indemnity*. The Defendants maintained, that, in all such cases, the insured would receive *more than an indemnity* on adjustments by the new rule ; but never *more*, nor *less*, under the old rule. The Court admitted,

Deducting
one third new
for old a well
settled rule of
law.

Indemnity
is the essence
of the contract
of insurance.

1st. That the rule of deducting one third new for old is a well settled principle of law :

2dly. That the contract of insurance is one of indemnity, which is its essence.

The premises are admitted—they are indisputable. Taking these as our points of departure, we arrived at very different conclusions from those of the Court. When we are satisfied our opinions on any subject are erroneous, we shall abandon them ; but while we are satisfied they are correct, we will cling to them. An adherence to error from pride of opinion is obstinacy, not wisdom. We were ready and willing to relinquish our opinions, if they could be proved to be erroneous. Having a desire to know all that could be said upon the question by the highest judicial authority, we waited, with some impatience, for the opinion of the Court. Our curiosity was excited to learn, how it could be proved, that insurers, in their mode of adjusting partial losses on ships, had so long deluded, or imposed upon the insured by a misapplication of two rules, so simple in their nature, and the correct application of which is an operation of common arithmetic, and requires no further advances in the science of figures, than to the Golden Rule of Proportion : and, how the insured, who generally understand so well how to work by that *Golden Rule*, should, from generation to generation, have been subjected to an erroneous mode of adjusting

losses ; with too little sagacity to discover a practical error, acting injuriously upon their *own interests*. Having obtained the opinion, we retraced the steps by which we had come to our conclusions, and followed those of the Court by which they came to theirs ; but without discovering either our own errors or their correctness.

The Court say, that “The usage” (that is deducting one third from the gross amount of the repairs) “relied upon by the defendants, is opposed to the essence of the contract of insurance which is a contract of indemnity.”

Now, if this assertion be true it is susceptible of proof ; and if it is not proved, we may presume it is because it is not true ; and, therefore, not susceptible of proof. If it be proved, we admit it settles the question, and there is an end to the whole matter. What then is the proof ?

Deducting one third new for old, the Court have laid down as a *rule of law* ; consequently, when the insured, in case of loss, receives two thirds of the original value of what has been lost, he is, *by law, fully indemnified*.

It is also admitted by the Court, “ that the rule of deducting one third new for old, however construed, will not always secure an *exact indemnity*. The assured will recover *more or less than an indemnity* according to the *age and state of the vessel before the loss*.” The reasons they give in favor of the rule are old ; but truth is not less valuable for its age. Does it require an argument to prove, that when a thing is *new* and received as one *third worn*, that the thing is received for *less* than its worth ; and when a thing is seven eighths worn, and is received for two thirds its original value, that the thing is received for

The new rule
violates both
those principles.

more than it is worth! Notwithstanding these obvious truths, and the labors of the Court to prove them to *others*; yet, *they themselves*, have stated an example in which, the thing lost was *not one third* worn, to show, that the insured is *not indemnified* when the adjustment is made by the rule for which the Defendants contended—thus conflicting against their own principles, and controverting their own reasoning to prove the correctness of those principles. We give below the whole case supposed. “Let us,” say the Court, “suppose, for example, that the vessel parts her cable in a storm, but that a part is saved; which is sold for \$200, and that a new cable is purchased which cost \$300. If one third is deducted from the full price of the new cable, this balances the account, and the assured is entitled to no indemnity.”

It must be remembered, that the Court admitted the rule of deducting one third new for old to be a well settled rule of law; therefore, if two thirds the original value of the thing lost is paid the insured, he is indemnified. Now, the cable when new, cost \$300,—when lost, it was, by the law, one third worn, and the loss to the insured was therefore only \$200; and, of course, he could claim nothing, for he had lost nothing.

The example proceeds, “If the part of the old cable saved, should sell for \$250, the assured, in stating an account, would become indebted to the underwriter \$50—and so whenever the old materials sell for more than two thirds of the amount of the expenses of repairs a balance will be found in favor of the underwriter.” This is contending against the rule itself. It is bringing an exception which proves, if it proves anything, the unsoundness of the general rule. The damaged article selling for more than two thirds

its *original value*, can it be necessary to say, was because it was not one third worn, as the rule considered it? The Court, however, on this supposed example, proceed in a train of reasoning on the *injustice and repugnancy of this mode of settlement*, to the *spirit of the contract*, apparently forgetting their own language in a few preceding lines—"that the rule," (deducting one third new for old) "however construed, will not always *secure an exact indemnity*. The assured will recover *more or less than an indemnity* according to the *age and state of the vessel before the loss*,"—and that, "neither party can question the *relative value of the new and old materials*, whether the rule, in a particular case, should afford an *exact indemnity or not*."

Astonishment has indeed been excited at this reasoning of the Supreme Judicial Court of Massachusetts. The Court say, that *neither party can question the relative value of the new and old materials*—and they state an example in which the *relative value is the only point in the question*—and then exclaim, that "a result so unjust and so manifestly opposed to the spirit of the contract of insurance ought never to occur!" And by their example too, they affirm, that "the assured in stating an account would become indebted to the underwriter \$50—and so whenever the old materials sell for more than two thirds of the amount of the expenses of repairs, a balance will be found in favor of the underwriter."

Did any one ever know, or hear of *such an account being stated*? The mind of the man who would make it must be disordered: he would require the advice of a physician, not of an attorney; the aid of *medicine* not of *law*. Men of business usually "state ac-

counts" and make claims on insurers, to show they have something *to receive from them* ; not when they sustain no loss under the policy to show, that they have something *to pay to them* !

It would appear from the manner of treating this question, that it had not two sides. The Court, indeed, admitted, that under the rule, the assured will recover *more or less* than an indemnity, according to the *age and state of the vessel before the loss.*"—But the case, they state, is one of *less than an indemnity*, because the value of the thing at the time of the loss, was greater than that assumed by the rule—being *less than one third worn*. Could not the Court have stated a case on the other side, where the insured would recover *more than an indemnity* ? If their supposed case *against the insured* shows a result so *unjust*, and so *manifestly opposed to the spirit of the contract* as ought never to occur, will not a supposed case *against the insurer* also show a result so *unjust* and so *manifestly opposed to the spirit of the contract as ought never to occur* ? We will suppose such a case.—A vessel in a storm slips her cable, and another is purchased which cost \$300. The old cable is afterwards recovered, and is worth neither more nor less, than it was at the time of slipping it. The cable is sold and produces but \$50, being five sixths worn. Now, under the rule contended for by the Defendants, the following would be the mode of adjustment ;

First cost of the lost cable,	- - - - -	\$300
Less one third new for old	- - - - -	100

Loss by the law under the contract, - - - \$200

Now by this mode of adjustment, the *loss* is estimated at \$200 ; but the article being five sixths worn, the *actual loss* is but \$50 ; the difference,

therefore, between the *actual* loss and the *legal* loss is \$150, which sum, being the *excess* beyond the *actual* loss, the insured is so much *more than indemnified*. In the first case, the insured receives *less* than he had *lost*, because the thing *lost* was worth *more* than two thirds of its first cost ; in the second case, he receives more than he had lost, because the thing was worth *less* than two thirds its first cost. But there is this difference in practice,—the *insurer* will, in such circumstances, never *be paid the profit* ; but will always *pay the loss*.

Such cases may be multiplied ; but they have no relation to the question. They prove nothing. Their bearing is upon the rule of deducting one third new for old, about which there is no controversy.

But will the rule of the Court be more equal and equitable in its operation—will it provide a more exact indemnity than that for which it is substituted ? We answer, no : it creates an evil, instead of removing one. In all cases it *gives more* to the insured, and *takes more* from the insurer. It operates all on *one side*. When the thing lost is *less* than two thirds worn, and the rule operates for the insurer, the effect of that favorable operation is *diminished* ; and when the thing is *more* than two thirds worn, and the rule operates *against* the insurer, that effect is *increased* ; and as the insured in such cases received more than an indemnity by the *former mode* of adjustment, the excess he receives beyond an indemnity, is still further increased under the *new mode*. Or, in other words, the losses on *one side* of the rule are for one party *augmented* ; and the gains on the *other side* *diminished* : While, to the insured, it is a gain on both sides.

The new rule of adjustment will always give more than a legal indemnity ; but the old rule neither more nor less.

Let us see how far the rule of the Court will oper-

ate in producing an indemnity *more nearly* than the old rule. We take the case stated by the Court, which, they say, *is so unjust in its result, that it ought never to occur.* The cable purchased to replace the one lost, cost - - - - - \$300

Deduct one third new for old - - - - - 100

Loss under the policy - - - - - \$200

The old cable is sold and the proceeds are paid to the underwriters and amount to \$250. By which the insurers receive more than they pay \$50. This the Court say “it a result so unjust, and so manifestly opposed to the spirit of the contract of insurance” that “it ought never to occur.”

There can be no injustice in executing a contract according to its conditions, and the mutual understanding of the parties at the time of making it. Is it *unjust*, if a ship is fully insured, is supposed to be totally lost, is abandoned, a total loss paid ;—and it appears afterwards, that she was not lost, is received by the underwriters and sold for *more* than they paid for her ? and so if goods are insured, abandoned, and sold for more than the sum for which they were insured ?—If there be injustice in the one case, there must be injustice in the others. But these are cases which very seldom occur ; and when they happen, it is because the result was not anticipated by the insured.

But the true point of light in which to view this question is not, whether the insurers have received more than they paid ; but whether, what the insured has received, is equivalent to what he has lost ? Was the cable then worth more than \$200 ? By the contract it was not ; if then he is paid *that sum he is indemnified* : for he has received all the loss which was covered by the premium.

The salvage, "say the Court," is no part of the loss, and belongs to the assured ; the amount of that, therefore, ought to be withdrawn from the operation of the rule, or the assured will fail to recover a full indemnity." They then cite a case stated and presented by the defendant's showing that, by the operation of the new rule, the insured would receive *more* than a full indemnity. But the Court add—"there is a fallacy, we think, in the objection and statement"—"It is true," say they, "the vessel is made better by the repairs."

The Court attempt to prove the fallacy by stating the following case—

"Whole expenses of repairs	-	-	600	00
Deduct expenses as paid by the proceeds of the old materials, those being the property of the assured	-	-	200	00
				400 00

The remaining disbursements being made at the expense of the underwriter, he is entitled to a deduction one third new for old

-	-	-	-	-	133	33
						\$266 67

and he is chargeable with the of \$266 67."

The Court had admitted that "the vessel is made better by the repairs" and they admitted, that the rule of law determines, that she is, by those repairs '*made better*' or more valuable one third of their amount; the vessel is therefore bettered \$200. But the insured receives \$200, for which he credits only \$133 33.—His loss is \$400 ; for this he receives \$200 in old materials, and \$266 67 of the insurers. Does he

not then for a loss of \$400, receive the sum of \$466 67? Now, if the loss of a cable which originally cost \$600, will, under one mode of adjustment, give a claim for \$466 67 as a true indemnity; it is evident, that, for the loss of the same thing, less than \$466 67 will not be an indemnity. Suppose there was no salvage,—it is then universally admitted, that \$400 in money will be an indemnity. Can a loss be greater with salvage than without it?—So the new rule makes it appear.

It being admitted, that when a cable costing originally \$600 is lost, it is worth but \$400 at the time of the loss.—Suppose in case it were lost, that the insured, instead of furnishing a new cable, were to supply an old one of similar quality and value as the one lost.—The account would then be balanced: the insured had lost one cable worth \$400, and received another of similar quality and value. Suppose the old cable be found, to whom would it belong? Can it, or ought it to make any difference in the ownership, whether the recovery be before, or after the adjustment?

But the Court deny, that the old materials are the property of the insurer; “it is however,” say they, “difficult to conceive how and when, before the adjustment of the loss, the property in the assured becomes divested, and vested in the underwriter.”

The court deny that the old materials saved and for which new have been substituted, are the property of the insurer.

It is more difficult to conceive, how the insurer should acquire a property in the salvage after an adjustment under the new rule, than before it: for under this rule, the salvage is considered as belonging to the insured, and so treated. On an adjustment then, the insurer has paid nothing for it, and has acquired no additional right to the property by that act.

Suppose before the adjustment they are destroyed by fire, or they are sold, and the purchaser becomes bankrupt; or they cannot be sold in the country where the vessel was repaired, and are shipped to another and lost on the passage? In either case, on whom would the loss fall? If they are "the property of the insured," and "clearly belong to him," the loss ought to be his. But if any such event were to happen, would any Court or jury so decide?

The right of property in the old materials is obtained upon the same principle, as a right of property is obtained in all other similar cases. The loss in question is a salvage loss, which is a total loss of a part of any subject insured. Here, without abandonment, a total loss of the damaged part is paid, and the salvage is vested in the insurer. "In such cases," (salvage losses) "though the property be not abandoned to the underwriters, the principle of abandonment, is assumed, and is in fact acted upon;—the property saved does not indeed actually belong to the insurers as where a regular abandonment is allowed, but it is to all intents and purposes treated as if it did, and all the charges incurred are born by them. The principle acted on is this;—the underwriter pays a total loss, and takes the proceeds of the goods." (Stevens on average, p. 79.) This applies to a part of the cargo, not to a part of the ship; and there is this difference between them—in the case of the cargo, the thing lost is paid for in money, not in kind—but in the case of the ship, the thing is paid for by furnishing another of the same quality and quantity.

The loss in question was a salvage loss and under such an adjustment the old materials are virtually though not formally abandoned.

"When goods, in consequence of any of the perils insured against, must be sold short of their destination, and there is either a proper abandonment,

or the loss, owing to its nature, must be treated as a total one without an abandonment, as when goods saved from a ship which cannot be forwarded to their destination, which is a salvage loss properly speaking, the underwriter must pay the difference between the value in the policy, (or the cost &c.) and the nett proceeds of the goods. There is no difference between a salvage loss with, and one without an abandonment, except that in the former the property, after payment of the sum insured, is transferred to the underwriters, and the nett proceeds divided amongst them in proportion to their respective interests; and in the latter the sale of the property is conducted by the assured, and the underwriters (who in such cases usually agree to a payment on account) pay the balance of the loss after it is finally settled." (Benecke on the Prin. of Ind'y p. 442, *vide*, also, Phillips, Hughes.)

If this be not the character of the loss, it must be a partial loss, and ought to be settled as such. What would be the result of the last case stated, if settled upon this principle? The value of a thing insured in an open policy, is the market value of it. A cable therefore which cost originally \$600 the market value would be - - - - 400 00

If not a salvage loss it is a partial loss and ought to be adjusted on that principle.

This cable is damaged, and sold for - - 200 00

If settled as a partial loss, the result will be the same as if adjusted under the old rule.

The difference between the sound and unsound is 50 per cent., which is the loss to be applied to the sum insured, and this is \$400, being 2-3 of \$600. The claim therefore would be \$200. And such would be the uniform result in cases where it could be applied. The coincidence in the results of this mode of adjustment, and that contended for by the defendants, show the incorrectness of the rule established by the Court.

Every part of a ship, separately considered, is valued in the policy at 2-3 the expense, that would, in case of loss, be required to substitute new. Thus a cable which costs \$600, is valued in the policy at \$400. If totally lost the insurers are liable for this sum, and no more. Nor are they directly or indirectly interested in any sum exceeding this amount—the excess on the expense of it belongs exclusively to the insurer as a distinct interest—as much so, as if he had lost an anchor of 600 lbs., and had procured another of 900. Now, as the salvage is derived only from what was insured, its value should be deducted from the amount only of what had been substituted to supply the loss. But by the new rule it is taken from a larger sum, thereby increasing the sum received beyond an indemnity.

Thus a cable is lost costing	-	-	\$600 00
The old cable sells for	-	-	200 00

400 00

Less one third new for old	-	-	133 33
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Then the cost of the new cable is	-	-	600 00
Less new for old as before,	-	-	133 33

\$466 67

Thus it appears, that the salvage which was derived from a loss of 400 is applied to a loss of 466,67. By this rule too the insurer sustains all the loss on the old materials arising from their damage, and wear and tear; and the proceeds are applied to the purchasing of new materials, on which, for the amount of the old, the insured makes no deduction.

Let another case be supposed—a ship which cost the owner \$15,000 is insured when new at that sum.

The parts of a ship are valued in the policy at two thirds their original value.

As she lessens in value by age and service, so he diminishes the sum at which she is insured, until her value is \$10,000, when she is one third deteriorated. Now, suppose in this state she were to get on shore, and it would cost more than 50 per cent. of her value to repair her damages, but worth as she was \$4,000. Suppose, too, that the insurer had a new ship of the same cost as the other when new, and in all other respects precisely similar. This vessel he tenders to the owner upon the same terms, he would furnish new work and materials to repair any loss or damage to the old ship. The offer is accepted. How will the account be adjusted? Under the new rule of the Court it would be thus;

Cost of the new ship,	-	-	-	\$15,000 00
Value of the old ship,	-	-	-	4,000 00
				11,000 00
Less new for old,	-	-	-	3,666 66
Insurance of old ship,	-	-	-	10,000 00

\$13,666 66

Thus, the insured would receive a ship, worth \$15,000 for which he would pay but \$13,666 66; and the difference between the two sums is the excess over an indemnity. "But," say the Court, "a weightier objection to our former decision remains to be considered. It is said to be immaterial to whom the old materials belong, or who pays the disbursements for repairs, because at all events the ship is made one third better by the repairs, and therefore, that one third of the gross expenses should be deducted or the assured will receive more than an indemnity—and this would be true, if the fact were, that such would

be in all cases the increased value, or if the presumption is to be carried to the extent the objection supposes." This seems to be conceding the whole ground—for the Court have admitted it to be a rule of law well settled, to deduct one third new for old. Can it be denied, then, that a vessel is made better one third the amount expended in repairs?—This would be contending against the rule itself, by which that fact is, in all cases, established. The Court add, "But presumptions against facts, established for convenience are to be strictly guarded, and a rule founded upon such presumptions is to be confined to the purposes for which it is adopted." And is not the ship equally bettered before as well as after the adjustment, by the repairs or new articles furnished?

What connexion has the rule of one third new for old with the question? The point is whether that one third shall be applied to the whole amount of repairs, or to the difference between this sum, and the value of the salvage. Now it does not affect the question whether one third, one sixth, or any other proportional part be taken as the difference between new and old; nor, whether the value of the articles lost or damaged be ascertained by estimation or established by law.

The Court say, "We understand the rule to be that one third is to be deducted from the expenses of repairing the loss, and that the loss is the injury done to the vessel which remains after the proceeds of the old materials have been applied. This is the loss against which the underwriter stipulates to indemnify the assured and so it was considered before the introduction of the existing rule. 1 Magens, 193." Unfortunately for the Court, the authority here cited is directly against them on this question.

The court
adduce Ma-
gens as author-
ity in the sup-
port of their
doctrine,
whereas this
authority is
against them.

Case cited
by the court.

The part of the case referred to runs thus ;* “ The translation of the instrument which contains the report of five persons appointed at the request of the captain by the Court of Justice at Copenhagen, shews, how they valued the damage, that happened to the ship and its materials by running aground, and by the breaking and cutting of the cables. Whereof, only the following, being the cutting of the cables is brought here as valued by them, viz.”

“ The same weighed 26 ship pounds and were worth 15 R’lrs per ship pound, making Rix	
Dollars	390 00
“ Deduct the neat proceeds of that part there- of which was saved and sold, being	35:4

“ Remain Rix D’rs	354:2”
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Remarks.

By this statement, it will be perceived, that the value of the damaged materials before the disaster, was estimated by competent persons, appointed for that purpose. The rule of deducting one third, was not then in use. Instead, therefore, of fixing the value by this deduction, as at the present time, it was then ascertained in that manner by estimation. Thus the cables before they were damaged were valued 390. The cables, when new we suppose to have cost 585. By the present rule, one third would be deducted for wear, making their value before the disaster 390. Whether the cables were more or less worn, affects not the question ; and it is quite as probable, that they were more, as that they were

* This is the case of the Swedish ship Victoria bound from Cronstadt, to Leghorn. On her passage she got aground and was repaired at Copenhagen.† The charges referred to are General Average. The cables and anchors were recovered. The quotation is from a statement dated in Amsterdam, 1748.

less. The point of inquiry is, whether taking the value of the old materials from the whole of the first cost, or from the value of the thing at the time of the loss, was *then the rule*? We say, the authority quoted sustains the latter; and is, therefore, against the new rule of the Court, and in accordance with the rule previously in use. *They* had one mode of ascertaining that value, *we* another; *they* by valuation, *we* by deducting one third. Now, it is of no importance, whether or not these two modes would give the same, or a different result. If from this result, however obtained, the value of the old materials is deducted, it establishes the point, that it was *then* the rule to deduct the allowance of new for old from the *gross* sum, and not from the *difference* between the value of the old materials and cost of the new. This, we think, is manifest—We claim, therefore, this authority *for us*, which was adduced as being *against us*; and the Court, no doubt, will respect it, as they themselves made use of it, though under an erroneous impression, that it sustained the doctrine for which they contended.

The Court say: “the salvage is no part of the loss.”

The language of the policy is “*losses*,” “which have or shall come to the damage of the said ship:”

A thing appertaining to a ship is lost to the ship, when, by the perils insured against, it is irreparably damaged, or rendered useless for the purposes for which it was intended; and it becomes necessary to substitute another. Thus, when a cable has been cut, and the remainder of it is too short for the general purposes of a cable, it is a loss of a cable to the ship, and the insurer must furnish another. If a boat be stove, or a mast sprung, or shivered by lightning, so as to be useless and irreparable, it is as much a

The loss of a particular thing belonging to a ship is when that thing is rendered useless and irreparable, &c.

loss of a boat or a mast to a ship, as the paralysis of a limb, is the loss of a limb to the human body ; or the withering of a branch, is the loss of the branch to the tree. The ship would not be seaworthy, unless the articles, which constituted a part of her, and have been rendered useless, were removed, and others, that would supply the deficiency, substituted. That, which is a daily occurrence, hardly admits of a question.

If old materials saved form no part of a loss ; new materials cannot be claimed for the old.

Although the Court decide that the salvage is no part of the loss ; yet, they say, that *a loss* is the difference between the value of the old materials saved, and the new substituted. If it be true, that the old materials saved form no part of the loss, it follows, that new materials can never be claimed while the old materials remain, because there is no loss of these materials. Thus if thirty fathoms of a cable of ninety be lost by cutting, the remaining sixty fathoms are not lost, consequently, the insured can have no right to procure, at the expense of the insurer, more than thirty fathoms ; and if he procures a new cable of ninety fathoms, he has substituted sixty fathoms of it for a like quantity, which was not lost ; and the insurer is chargeable with no part of this.

Although by the decision of the Court the old materials are not lost, but belong to the insured ; yet, under that decision, new materials of like quantity, quality and value as the old, when new, may be obtained in lieu of them ; and the difference in value charged to the insurers, and to the amount of the old materials in value, the insured receives new for old, without deduction.

In such case the insurer is answerable only for the damage occasioned by the disaster.

If the old materials belong to the insurer, they belong to him *absolutely* and in *kind*. He cannot sell them for *underwriters account*, and charge them with

all the losses of converting them into money ; and, with the proceeds, buy new articles for their account. The Court told us, that indemnity is the essence of the Contract of insurance ; and so is it the essence of the Contract, that no new thing shall be obtained for another, that is *not lost*. Suppose a cable is damaged, but none of it lost ; that it remains the same in weight and length as before the damage ; but a new one is necessary, and obtained. The old cable by the doctrine of the Court is no part of the loss, and belongs to the insured, of the property in which he is not divested. What more then ought they, the insurers, in any view of the case, to pay, than the amount of injury by the *damage* ? But it is plain, that if the cable be sold, that the value being diminished, not only by this injury, but by wear and tear, it will produce as much less as the diminution in value from both those causes combined ; and it is equally obvious, that the insurer not only suffers the loss from those two causes ; but the proceeds, being deducted from the new cable, and the third new for old deducted from the balance, he sustains a further loss, by furnishing that proportion of the value of the new cable, without receiving the benefit of one third new for old.

Let us examine the operation of the new rule by one other case not of value but of quantity.

Examina-
tion of the new
rule by a case
of quantity
not of value.

No question can exist that, if a cable be rendered useless or irreparable by the perils insured against, the owner has a right to demand another of the insurer. Suppose of a cable ninety fathoms long sixty had been lost by cutting, and thirty saved ; that a new cable of similar length is furnished by the in-

surer. How, under the rule of the Court, would the loss be adjusted?—It would be thus :

The old cable lost was in length	-	90	fathoms
Deduct the old materials, these being			
the property of the assured,	- -	30	“
		—	
		60	“

The remaining quantity being furnished,			
at the expense of the underwriter he			
is entitled to a deduction of one third			
new for old,	- - - - -	20	“
		—	
		40	“

and he is chargeable with forty fathoms. In this statement we have adopted the formula of the Court—And what is the result ? It shows, that the insurers are to furnish forty fathoms ; that the insured has 30 fathoms, being the remainder of the old cable, which the Court say were not lost and belong to him ;—These together make seventy fathoms, ten more than an indemnity under the rule of law admitted by the Court.

Now, this mode would be right and equitable, if the thirty fathoms remaining of the old were used in the repair by adding to them sixty fathoms of new. But this is not the practical operation of the rule, if it were, no complaint would be heard against it : nor is the operation and effect such as they appear to be by the statement of the Court, as this shows a result after the materials had been converted to money. The thirty fathoms saved would not be received as thirty fathoms of cable. They would be first sold, and as many fathoms, not of old, but of new cable as the nett proceeds would purchase, would be considered as the quantity to be deducted. Thus, if the thirty

fathoms of old would purchase but twenty fathoms of new, the twenty fathoms only are deducted; the insured thereby receiving for the old material new without deduction. And the thirty fathoms of old cable, which the Court say are not lost but belong to the insured, are sold for the account of the insurer and produce but twenty, by which, in effect, he is charged with thirty, and receives credit only for twenty. Should sixty fathoms only of new cable be purchased, and the thirty fathoms of old be added to it, in this case, "so far as these go, the subject repairs itself," and "go to reduce the cost of repairs;" and not, as in the case stated by the Court, where they are sold and not used again, and consequently their place is supplied by new.

It seems to be evident, that the Court on this point of indemnity have "begged the question." They maintain, that under the rule contended for by the defendants, the insured would not receive an indemnity, which is the essence of the contract of insurance: and to prove it, they cite a case in which the article damaged, was not one third worn, which is an extreme case in favor of their position, under the admitted rule of law allowing in all cases a deduction of one third: then they assert this is not indemnity: thus using as a medium of proof what, if considered abstractly, they themselves would not admit to be sound, and indeed have in effect denied. If a thing be totally lost without salvage, although at the time of the loss, it was entirely new, they admit, that the insured is indemnified by the payment of two thirds the first cost of it: for, they have laid down as a rule of law, that one third shall, on all partial losses on a ship, ex-

The new rule is established upon an extreme case assumed and not warranted by the rule of law prescribing one third as the difference between new and old, &c.

cept on anchors, be deducted from the expences of labor and materials.

Indemnity is a payment of the loss according to the contract. The indemnity meant by the law and the contract, is the only indemnity contemplated by the parties to the contract; and that can, either lawfully or equitably, be claimed. The lawful indemnity, is an equitable equivalent. It is, indeed, not only a reasonable supposition, but a fact susceptible of proof, and which has been proved, that in the aggregate, the loss by wear and tear exceeds one third of the original value; consequently, that the proportion allowed on new for old is insufficient: and it has been shown, that, in all cases, where the thing is more than one third worn, the insured recovers more than he has lost.

The Court have established a general rule upon an extreme case assumed in favor of one party, and which will always operate against the other.

But upon that fallacy the Court have reasoned, and decided the question. On an extreme case in favor of one party, grounded upon that fallacy, they have, illogically deduced a general principle to the injury of the other. Assuming as fact, that the rule of law operates always *against* the insured, they have prescribed a new rule, which will operate always in his *favor*.

But the *assumed* fact, differs widely from the *actual* fact: experience shows, that under the rule of deducting one third new for old, the *insurer*, and not the *insured*, is the suffering party. For proof of this, *actual*, not *assumed* facts will be adduced.

The small difference in the value of old and new copper, renders the operation of that rule, on a loss of this article, apparently less favorable to the insured, than on a loss of others where this difference is greater. Hence, the advocates of the new rule, have usually selected this article to show what they

deem to be the error of the common mode of adjusting a loss. But even on *that* their calculations are uniformly made on the *assumed* fact, that the copper was *less than one third worn*: and without assuming this ground, they would, in every instance, utterly fail of making even the appearance of a case of non-indemnity, under the former mode of applying the rule of law. What then are the actual facts regarding the loss of copper? We have examined every case of new coppering ships, which an Insurance Company of this city has had, since they commenced business, embracing a term of eight years. The whole number of cases was seventeen; but the particulars of only sixteen could be obtained. By these it appears, that the aggregate weight of the new copper furnished, exceeded that of the old copper saved, forty-two and three fourths per cent,* which was the loss by wear and tear; consequently, the insurer has received credit for thirty-three and one third per cent. and been charged with forty-two and three quarters per cent.—by which he has paid nine and five-twelfths per cent. more than was loss, and so much exceeding an actual indemnity,—the difference being not *one third* as established by law, but forty-two and three quarters per cent. as established by fact. Such then is the real result evinced by experience.

* Weight of old copper saved.	6113	Weight of new copper furnished.	6942	Number of vessels.	1
	6768		9458		2
	2831		5989		3
	5929		7904		4
	3526		7045		5
	4108		7672		6
	4660		7910		7
	5991		7582		8
	2995		7764		9
	3760		7920		10
	133		477		11
	2368		4885		12
	3767		8349		13
	4146		7354		14
	2986		7224		15
	4539		8339		16
	"		"		17
			112,814		
			64,620		

If it be said, that a part of the old copper may have been lost or stolen, it affects not the argument: for, if the vessels had been coppered at their owner's expense, we are bound to believe, that the same losses would have been experienced, as the fidelity of the agents employed, is not to be questioned: Moreover, if the old materials do not, as the Court maintained, belong to the insurers, that part of them which was lost, not by the perils insured against, ought not to be borne by them.

The fact here adduced proves more, than that the deterioration by *wear and tear*, exceeds the proportion established by law. It may be taken for granted, and the position will not probably be disputed, that, when the copper upon a ships bottom is diminished by wear and tear one third of the whole original weight, the vessel *then* requires to be new coppered; consequently, of the sixteen vessels new coppered by the insurer, twelve of them, at least, if no accident by the perils of the sea had happened, required and would have been new coppered at the expense of their owners: and, according to the loss *per centum* on the aggregate, not only twelve, but the whole number, required, at the time of the loss, new coppering.

It may also be taken for granted, that the average duration of the service of copper is three years, although its annual loss of weight is but one-ninth of the original quantity; consequently, every coppered vessel, after three years service requires to be new coppered: and when this is done at the expense of the insurers, if the copper had been in use more than one year, the deduction of one third is less than the actual diminution of value by wear, in proportion as that excess bears to the whole term.

Nor is that excess of loss in the weight of copper, the only loss sustained beyond the proportion established by law. The same relative excess beyond an indemnity, will exist in all the repairs attendant on new coppering : Stripping off the old, and putting on new copper ; recaulking, painting, &c. are charges always comprised in, and form a large proportion of the expense of new coppering,—these, and in most cases, many others are paid by the insurer. If, therefore, the difference of weight between the old and new copper, be taken as the criterion of wear of those parts of a ship, which must be repaired, when she is new coppered ; the deduction of one third is less by nine and a half per cent., than the actual deterioration by wear and tear.

The severity with which the new rule will operate on the insurer, may be thus seen. For, he not only pays that per centage on the sum expended for repairs ; but, by the new rule, this excess will be augmented by one third the value of the old materials saved.

But the sum exceeding an indemnity which the insurer, under the rule of the Court, is compelled to pay, is not its most objectionable feature :—This, as it increases the risk, may be counterbalanced by an adequate increase of premium. It is being obliged in adjusting an account to abandon a rule known to be right, and to act by a rule demonstrably wrong ; for, we hold, while it is admitted that the old materials are, at the time they are lost, one third depreciated by wear, so long will it be true, that when the insured obtains more than two thirds the first cost of new materials, will he receive more than an indemnity : and when one third of any given value has been lost, what is the value of the remaining

two thirds, is a problem of too easy solution to admit of any question in the result. Moreover, the decision prescribing this rule, in effect pronounces the old rule to be false ; the decision, then, is an impeachment of the morality or capacity of those, who have so long practically applied it to the adjustment of losses.

We feel compelled here to remark, and we do it with regret and reluctance, that the Court, throughout their argument, appear to have viewed but one side of the question,—and that the side of the Plaintiffs—All the cases supposed, are extreme cases on that side. Why, let us ask, did they, in all cases, take the thing as less than one third worn ? and why, in no one instance, have they taken it as more ?—Why did they not fix upon the line prescribed by the law, and keep, in their arguments and stated cases, on that line ? Why, after admitting, “ that the rule of deducting one third new for old, however construed, will not always secure an exact indemnity, that the assured will recover more or less than an indemnity according to the age and state of the vessel before the loss, but this imperfection of the rule is supposed to be more than compensated by its certainty, simplicity and practical convenience ” ; that “ the rule of deducting one third new for old was long since substituted for the ancient mode of adjustment, and its continuance for such a length of time proves its practical utility. Since the introduction of the rule neither party can question the relative value of the new and old materials, whether the rule in a particular case should afford an exact indemnity or not.” Why, we repeat, after all these admissions, did they, in answer to the Defendants who asserted, that : “ the ship is made one third better by the repairs,

and, therefore, that one third should be deducted, or the assured will receive more than an indemnity," say, "And this would be true, if the fact were, that such would be, in all cases, the increased value, or if the presumption is to be carried to the extent the objection supposes."—Is not one third of the repairs, *the increased value* given by *law* in all cases of repairs upon a ship? Is there any *presumption* in assuming what the *law* establishes *as fact*? Why could not the Court have tried the other side of the question? And have stated and considered a case or two where the materials were more than one third worn? then, they would have seen, that, in such cases, which certainly are no less rare than the others, the increased value by law, was less than the increased value in fact.

The old rule of adjustment gives, in all cases, an exact legal indemnity; it operates uniformly in all circumstances. The new rule gives an indemnity in no case; it operates exclusively against one party, and for another; and, when the insurer by law pays more than is lost, by this rule, his loss is made still greater. The law considering the materials to be one third worn at the time of the loss, no other mode of adjustment than that under the old rule can furnish a legal indemnity; or be a correct rule of law—for that cannot be a rule of law, which counterworks the law itself.

We have thus, we think, evinced:

1. That the usage contended for under the policy was not a *local*, but a *general* usage:
2. That the usage is of long continuance, having existed from the time of Magens nearly a century ago; that it was known to the parties to the contract, which was made in reference to it:

3. That *local* usages have the force of law where they prevail, if they are well known and long established, because they are *then* presumed to have been in the contemplation of the parties :

4. That the policy has reference to such usages, as they relate to the mode of adjusting losses :

5. That by the terms of the policy expressed, and by the usage as known and established and not expressed, the insurer is not liable for a loss by any other mode of adjustment, than that in use at the time of making the policy :

6. That under the new rule a construction is given to the policy, by which the insurer is made liable for losses, which it was intended to exclude :

7. That the unenumerated losses, are such only as insurers are liable for by the rules and customs of Boston :

8. That the new mode of adjustment is repugnant to those usages :

9. That the new rule violates the spirit of the contract, the essence of which is indemnity :

10. That it violates a settled rule of law, which prescribes what is indemnity :

11. That the old mode of adjustment always gave a legal indemnity, but the new mode will always give more than such an indemnity :

12. That the loss is a salvage loss ; and the old materials saved, are virtually abandoned, and belong to the insurers :

13. That, if the old materials belong to the insured, the loss is a *partial* loss, and ought to be settled as such :

14. That, if settled on the principle of a partial loss, the result would, in all cases, be the same, as if settled by the old mode of adjustment :

15. That a loss of a particular thing appertaining to a ship, is when that thing is, by the perils insured against, rendered useless and irreparable, and its place is supplied by others :

16. That, if the old materials do not belong to the insurers, but to the insured, the old materials are not lost, and others cannot be claimed of the insurers :

17. That, in this case, the insurer is answerable only for damage sustained by the disaster :

18. That the new rule was established upon an extreme case assumed, and not warranted by the rule of law prescribing one third as the difference between new and old, in all cases of partial loss on ships :

19. That this extreme case was on one side ; and the rule established was intended, and actually does operate *always in favor* of that side, and *always against* the other :

20. That the new rule, therefore, is consistent, neither with the policy nor usage, with law nor justice.

AN UNDERWRITER.

Ex. G. H. S.

4/19/56



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